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THE CORPORATION TRUST COMPANY AND AFFILIATED COMPANIES

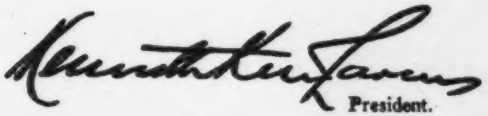
The policy of The Corporation Trust Company in all matters relating to the incorporation, qualification, statutory representation, and maintenance of corporations, is to deal with members of the bar, exclusively.

UNITED STATES SUPREME COURT.

On the convening of the Supreme Court of the United States on October 1, for the 1928 Term, the Chief Justice announced that since the close of the last term in June, 1928, petitions for certiorari had been filed to the number of 244. This is a forceful indication that the present session of the Court will be an active one. Many members of the bar subscribe to our Supreme Court Service full particulars concerning which we shall be glad to furnish on request to any one of our offices.

OUR PHILADELPHIA OFFICES

formerly located in the Land Title Building are now at 2632-35 Fidelity-Philadelphia Trust Building where, with increased facilities we are better equipped to give service to members of the bar. Joseph P. Murray continues as Philadelphia Secretary.



President.

"IT won't make any difference in the case of this particular company as there is no one but ourselves to consider," is so often the attitude taken by officers of a new or closely held corporation in opening or keeping up the stock records. But so often the simple conditions change.

When The Corporation Trust Company is appointed transfer agent it brings up and keeps the company's stock records as though they were to be audited tomorrow by unfriendly interests. To be prepared for the unexpected is good practice in corporate affairs.

THE CORPORATION JOURNAL

Edited by John H. Sears of the New York Bar

VOL. VIII, No. 168 NOVEMBER, 1928 PAGES 265-288

The Corporation Journal is published by The Corporation Trust Company monthly, except in July, August and September. Its purpose is to provide, in systematic and convenient form, brief digests of significant current decisions of the courts, and the more important regulations, rulings or opinions of official bodies, which have a bearing on the organization, maintenance, conduct, regulation, or taxation of business corporations. It will be mailed regularly, postpaid and without charge, to lawyers, accountants, corporation officials, and others interested in corporation matters, upon written request to any of the company's offices (see next page).

When it is desired to preserve the Journal in a permanent file, a special ring binder will be furnished at cost ($2) and thereafter before mailing, each copy will be punched to fit the binder.

Contents for November

Increasing Use of No Par Shares

Rapid increase in the use of no-par stock in the financing of corporations in the United States is disclosed by an analysis of the extent of such issues, prepared by the National Industrial Conference Board, 247 Park Avenue, New York. While there is no means of ascertaining the total amount of no-par stock outstanding since 1925, the report says the immense growth of this method of financing in recent years is reflected in the fact that, while the "fair value" of all outstanding no-par stock in 1925 is estimated by the Conference Board as less than $7,000,000,000, the market value of no-par issues listed on the New York Exchange alone at the beginning of 1928 amounted to nearly $17,000,000,000 This latter figure in part reflects a considerable increase in market value as well as in actual number of shares issued, but an analysis of corporation financing during the past six years indicates that no-par value issues are becoming increasingly popular, particularly with big business concerns. Although the first law permitting no-par issues was enacted in 1912, in New York, little if any effort has been made to discover the total amount of no-par stock outstanding. On the basis of capital stock tax data, however, the Conference Board finds that by 1922, a total of 6,763 companies or nearly two per cent of all corporations in the United States, had issued no-par shares, while in 1925 a total of 17,543, or nearly five per cent of all corporations had issued no-par stock, the total "fair value" of which amounted to approximately $6,900,000,000. Like data are not available for later years because the capital stock tax was discontinued in 1925, but the listings on the New York Stock Exchange, representing the bulk of all important issues, reflect still more rapid growth of no-par stock issues during the past four years. In 1925, 213, or 23 per cent of a total of 926 issues listed on that exchange, were no-par issues, representing in market value $5,284,000,000 or 19.5 per cent or less than one-fifth of the total market value of $27,070,000,000 of all listed issues. By 1928, the number of no-par issues had grown to 399, representing 36.4 per cent of all issues listed, with a market value of $16,850,000,000 which is 33.9 per cent or more than one-third of the total market value of all listed stock issues. While these figures disclose the increase of no-par stock outstanding in proportion to the outstanding total of securities, they do not fully reflect the important role played by this form of stock issues in the new year by year financing during the past few years. During 1926, when the net gain of stock listings over 1925 was 117, as many as 90 issues or more than 75 per cent were no-par issues. In both 1927 and 1928, the net gain in the number of stock issues listed over the preceding year was greater for the no-par issues than for the total of all issues. No-par stock issues according to the findings of the National Industrial Conference Board, appear to be most popular among industrial, service and finance corporations, but are found hardly at all in the field of railroad financing. Leaving out railroad stock issues from the total number of issues listed on the New York Exchange as of January 1, 1928, the Board finds

that nearly 43 per cent of all outstanding non-railroad stock issues were of the no-par variety. While corporations with no-par stock issues operate in practically all states, the proportion of all returns made to the Internal Revenue Bureau is greatest in Delaware, where such corporations accounted for one-fifth of all returns in 1925. Rhode Island, Massachusetts, Maryland, Ohio, New York and the District of Columbia rise considerably above the average.

Domestic Corporations

Delaware.

Promotion stock held in escrow by Ohio department of securities before delivery pending fulfillment of a condition is not subject to call for unpaid subscriptions by receiver, there having been no fulfillment of the condition. Action by the receiver of a corporation to recover for the benefit of its creditors unpaid stock subscriptions. The stock in question was for promotion and organization work; the department of securities of the state (Ohio) had issued its certificate of corporate compliance on condition that the stock be escrowed with the department, not to be delivered or become effective "until there had been earnings of as much as 14 per cent. on all the stock issued and sold." The United States Circuit Court of Appeals, Sixth Circuit, says that "as this condition was never performed, there was no binding stock subscription" and affirms the judgment below for the defendant "stockholders." Kirby v. Wilson, et al., 27 F. (2d) 327. George W. Ritter, of Toledo, Ohio (Ritter & Brumback, of Toledo, Ohio, on the brief), for appellant. Edmund Burroughs, of Akron, Ohio, for appellee Swinehart.

Federal.

Trade-marks and trade-names, and unfair competition. One question here, involving the construction and application of the Federal Trade Mark Act of 1905, particularly § 16, is "whether the plaintiff's registration of its trade-mark and the rights secured to it thereby serve to protect it in territory in advance of the actual extension and establishment of its trade there." The Supreme Court of Ohio, affirming the judgment below, says: "No case has been cited construing or applying this section 16, and we have found no precedent to assist in the consideration and determination thereof." Defendant urges that the answer should be "No" in view of the decisions of the United States Supreme Court in Hanover Star Milling Co. vs. Metcalf, 240 U. S. 403, and United Drug Co. vs. Theodore Rectanus Co., 248 U. S. 90, but the Court says that "It is quite obvious that the act of 1905 had no application in either of these cases, and did not enter into their consideration." After quite full discussion of the question the Court expresses its opinion "that the purpose and effect of this statute was to project the trade-mark rights of the registrant and owner thereof into

all the states even in advance of the establishment of trade therein, and to afford full protection to such registrant and owner." And that the provisions of the act as so interpreted and applied are not violative of the Federal constitution but are authorized by the commerce clause thereof. United States Printing and Lithograph Co. vs Griggs-Cooper & Co., 162 N. E. 425. Walter F. Murray and Frank L. Zugelter, both of Cincinnati, for plaintiff in error. Cobb, Howard & Bailey, of Cincinnati, and Morphy, Bradford, Cummins, Cummins & Lipschultz, of St. Paul, Minn., for defendant-in-error.

Idaho.

Liability of preferred stockholders for unpaid stock subscription. Action by creditors of a corporation, against which judgment was recovered and execution on which was returned unsatisfied, against a preferred stockholder on his unpaid stock subscription. The running of the statute of limitations (5 years on written contracts; 4 years on oral contracts) was pleaded in bar. The Supreme Court of Idaho affirms the judgment of the court below sustaining the demurrer to the complaint. The court after saying that holders of preferred stock, in the absence of express provisions to the contrary, are held to the same liability as common stock holders; that the statute of limitations is a good defense; that, as there is no special statute of limitations applicable to actions founded on unpaid subscriptions the general statutes are applicable; comes to the question "When did the cause of action accrue against defendant on his subscription?" In answer the court says that at the moment the preferred stock was issued (it cannot be issued except for cash or its equivalent or at less than par) the company had the right to sue defendant for its par value, that the case comes within the ordinary rule that the right of the creditor to recover unpaid stock subscriptions from a stockholder is barred when the right of the corporation to recover is barred, and as 7 years had elapsed since the subscription was made before the present suit to recover was instituted that the action is barred. Ellis et ux. vs. Capps, 269 P. 597. Holden & Coffin, of Pocatello, for appellants. John W. Jones and Guy Stevens, both of Blackfoot, for respondent.

Indiana.

On corporate existence versus right to begin business. The Indiana law provides (Burns A. S. § 4842) that before beginning business a corporation shall file with the county recorder a copy of its articles of incorporation, approved by the secretary of state and that it shall have no rights or privileges as a corporation until such filing and until one-fourth of its stock has been subscribed for and one-fourth of the subscription price of the stock so subscribed is paid into the treasury. In the instant case suit was brought by certain of the organizers (the appellants here) of a corporation, to which the secretary of state's certificate has been duly issued, in connection with a contract entered into between the corporation and the appellees under which the latter agreed to purchase stock of the former, on the theory that the corporation not having complied with the foregoing steps subsequent

to the issuance of its certificate by the secretary of state had no rights or privileges as a corporation, and that therefore it was not a corporation but a partnership. The Appellate Court of Indiana holds that any action growing out of such a contract must be brought by the corporation or someone authorized to represent it since the corporation has a legal existence, even though it has not complied with the statutory provisions as outlined above authorizing it to do business, and has been a corporation *in esse* from the time its articles of incorporation were approved by the secretary of state and his certificate to that effect issued; that "the rights and privileges which it had no right to exercise until it had conformed to the requirements of [Sec. 4842 of the Annotated Statutes] must be construed to mean the rights and privileges granted to it by its charter which were to transact the business for which it was incorporated"; and that "it could not have been the purpose of the Legislature to prevent the corporation from obtaining subscriptions to its capital stock, enforcing the collection of the same, or from making any other preparation for the transaction of the business which it was authorized to transact by its charter." Sterne et al. v. Fletcher American Co., et al., 161 N. E. 580. Roemler, Carter & Rust and Floyd Mattice, all of Indianapolis, for appellants. Paul Y. Davis, Kurt F. Pantzer, Smith, Remster, Hornbrook & Smith, and Le Roy Zapf, all of Indianapolis, for appellees.

Louisiana.

A new and complete general corporation law "To provide for the incorporation, regulation, merger, consolidation and dissolution of certain corporations for profit, etc.", known as the "Business Corporation Act" (Chapter 250, Laws of 1928) has been enacted by the Louisiana legislature, effective on and after January 1, 1929. Section 71 of the Act is of interest though of no particular significance, apparently. Such section reads: "This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." We have before us a pamphlet in which appears the new law, together with extracts from the statutes and summaries covering foreign corporation requirements in Louisiana and the Louisiana "Blue Sky" law, "Printed by authority of James J. Bailey, Secretary of State, Baton Rouge, La."

Michigan.

Equitable relief in case of sale of shares of stock induced by fraud. In this case the sale in question is shown to have been induced by fraud. The court below decreed the return of the stock on repayment of the purchase price. The Supreme Court of Michigan reverses the decree in respect of the relief granted. The purchaser had immediately resold the stock to a third party at a greatly increased selling price. In view of this latter fact the Supreme Court says that it is beyond the power of the court to decree the return of the stock. It is of record that the defrauding purchaser owns shares of the same stock, of the same class and character, and in number in excess of those sold to him by the plaintiff. The stock is now worth much more than

at the time of the sales here involved. The court says: "Our attention has not been called to any cases which hold that a court of equity can compel a defendant to substitute stock of like character for that obtained in a fraudulent purchase." The defrauded party is entitled either to a return of his identical shares or to damages for his loss. As the shares cannot be returned here, the decree will be for the difference between the sum paid to the plaintiff and the amount for which the shares were immediately thereafter sold by the defendant. Gray vs. Trick, 220 N. W. 741. Gore & Harvey, of Benton Harbor (Knappen, Uhl & Bryant, of Grand Rapids, of counsel), for appellent. John J. Sterling, of Benton Harbor, for appellee.

Ohio.

Dissolution of a corporation. In an action for, among other forms of relief, the dissolution of a corporation by a minority stockholder, a motion for appointment of a receiver was denied by the court of common pleas. The Court of Appeals of Ohio, Cuyahoga County affirms the judgment. The court relies on Hoiles vs. Watkins, 157 N. E. 557, and quotes from the opinion therein, "Especially is it to be noted that the appointment of a receiver [in Ohio] is merely ancillary to the main cause of action and incidental to the chief and ultimate relief sought, and can be invoked only in a pending suit brought to obtain relief which the court has power to grant." In the General Corporation Act (112 O. L. 9), in sections 86 and 87 of the act, sections 8623-86 and 8623-87, General Code, the Legislature has made provision for dissolution both as to the grounds and as to the parties who may bring the action. The court says that "we must regard the provisions of the recent enactment as exclusive, and hold that under the statute in this state a court of common pleas has no power to dissolve a corporation except as provided therein." There is no provision in the statute for the filing of a petition for dissolution by a minority of the stockholders. Shearer vs. Union Mortgage Co., 162 N. E. 696. Joseph L. Stein, of Cleveland, for plaintiff in error. Garfield, Cross, MacGregor, Daoust & Baldwin, of Cleveland, for defendant in error.

Ontario, Canada.

Contract by promoter of corporation; completion of contract after incorporation. In the Reporter's Editorial Comment on Hudson-Mattagami Exploration Mining Co. vs. Wettlaufer Bros., Ltd., [1928] 3 D. L. R. 661 it is said: "A situation often arises in which when a company is about to be formed it is necessary for the promoters to make purchases for the company without waiting for the completion of incorporation. Such a situation is fraught with difficulty as the company, not being then an entity, cannot contract and cannot have an agent, nor can it after incorporation adopt pre-incorporation acts of the promoters whether by ratification or in any other way. A way out of this difficulty is shown by [the case cited above]. The Court there finds no objection to the promoter making a provisional contract to be completed by the company on incorporation. Such a contract, so the Court says, would not be a contract at all until the company comes into ex-

istence. * * * the importance of the case, however, lies in its demonstration of a way out of the difficulty of making pre-incorporation contracts."

Pennsylvania.

Municipal regulation and licensing of motor buses engaged in interstate business. The United States Circuit Court of Appeals, Third Circuit, affirms the judgment of the District Court upholding the validity of an ordinance of the City of Philadelphia regulating the operation of motor buses within the limits of the city and imposing an annual license fee of $50 for each such bus, as applied to such buses engaged in interstate business only. The regulating consists of designating the streets over which the buses may be operated, requiring information relative to the owner, the bus itself (size, capacity, etc.), and the driver (ability, experience, character, etc.). It is held that in the absence of Federal legislation on the subject a state, or a city to which it has delegated the power, may regulate the use of vehicles on the highways, in interstate commerce exclusively, in order to insure the public safety and convenience, the regulations to be reasonable, and may impose a reasonable license fee. It is further held that the regulations under the Philadelphia ordinance are necessary and reasonable in every way and that the license fee is no more than necessary to defray the expense of administering the regulations and to be a fair contributive share to the cost of constructing and maintaining the highways. American Motor Coach System, Inc., vs. City of Philadelphia, United States Daily, Oct. 10, 1928, page 8.

Tennessee.

Rights to dividends in cases of not-yet exercised option to purchase shares of stock and of not-yet executed contract of purchase thereof. In denying petitions for writs of certiorari in the instant case, into the merits of which it is unnecessary to go beyond stating that one issue was whether a certain written agreement was a contract of purchase of shares of stock or an option to purchase such stock, the Supreme Court of Tennessee says: "The law seems to be well settled to the effect that, where an option to purchase stock of a corporation is given, and before the option is exercised a dividend is declared, it goes to the person giving the option. On the other hand, where a contract of purchase has been entered into, but the delivery of the stock and the payment of the purchase price has been deferred, and before the contract is executed a dividend is declared, it goes to the purchaser." Thompson et al. vs. Exchange Building Co. et al., 8 S. W. (2d) 489. Chandler, Shepard & Owen, Riddick & Riddick, and Metcalf, Metcalf & Apperson, all of Memphis, for appellants. Wilson, Gates & Armstrong, of Memphis, for appellees.

Foreign Corporations

California.

Issuance in California of stock of foreign corporation without having secured permit so to do under Blue Sky Law. This is an

action to rescind an agreement to convey mineral rights in certain California lands and to cancel a certain deed given thereunder in exchange (effected in California) for stock of a Nevada corporation organized to take over such rights. The corporation had received no permit to issue or sell its capital stock from the commissioner of corporations under the Corporate Securities Act (Stats. 1917, p. 673). The court below found "that plantiffs and defendant were advised [before entering into the exchange agreement] by the same attorney that a foreign corporation need not secure a permit." In affirming the judgment below for plantiffs the District Court of Appeal, Third District, California, says, citing numerous cases that "The issuance and sale by defendant of the capital stock, or an agreement for such sale, without a permit being issued by the commissioner of corporations therefor is illegal and void. Such a contract is not voidable but void, being in contravention of the statute providing a punishment for the act complained of. Since the issuing of the stock was unauthorized, and the act in so doing void, it results that plaintiffs have received nothing whatsoever for the lands conveyed by them to the defendant. There has been a total failure of consideration." Mitchell et al. vs. Grass Valley Gold Mines Co., 268 P. 1095. E. H. Armstrong and Frank R. Wehe, Jr., both of Grass Valley (Frank R. Wehe, of San Francisco, of counsel), for appellant. Nilon & Nilon, of Grass Valley, for respondents.

Colorado.

Personal liability, as partners, of officers, agents, and stockholders of unqualified foreign corporation, on a Colorado contract. The defendant-appellants are the directors, officers, and agents (and presumably sole stockholders) of a Delaware corporation engaged in the investment business, including the purchase and sale of bonds and other securities, with its principal office for the conduct of the business located in Denver. No attempt had been made by the company to comply with the requirements of the Colorado statutes relating to foreign corporations doing business in the state. Action is against the defendants as partners (Section 2324, C. L. 1921) on a contract for the sale of certain bonds by the corporation to a Washington corporation, which contract the Colorado Supreme Court, in affirming the judgment below, holds to have been made in Colorado since the acceptance of the offer to buy (that is, the confirmation of the sale) was effected in that state. The defendants contended that the contract was one consummated in Washington, and so, that the statute did not apply; it was also contended that the offer and acceptance constituted a transaction in interstate commerce. The court finds no merit in the latter contention, and, as stated, confirms the judgment below holding the defendants jointly and severally personally liable for damages for the failure of the corporation to make delivery of the bonds which it had contracted to sell to plaintiff and which, on closing of the contract, the latter had immediately resold at an advance in price. Frank W. Keeler, George E. Keeler, and H. Walter Baldwin, Jr., a partnership doing business under the firm name of Keeler Brothers & Co., vs. Union Trust Co., not yet officially reported. Fillius, Fillius & Winters (Richard S. Fillius, of

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In getting a client's business properly incorporated—in any state—or in getting a going company qualified to do business in any states other than that of incorporation, every lawyer knows the great relief that comes from being able to have questions answered and uncertainties cleared away by actual precedents from the jurisdiction involved; and from having the details of filing and recording papers taken care of for him promptly and skilfully . . . That is the service which The Corporation Trust Company renders to attorneys.

counsel), all of Denver, for plaintiffs in error. Hindry, Friedman & Brewster, of Denver, for defendant in error.

Kentucky.

"The failure of a foreign corporation to comply with the provisions of section 571, Ky. Statutes, requiring a statement to be filed with the secretary of state, giving the name of the agent upon whom process may be had, was formerly held to be a defense to an action brought by such corporation; but the decisions so holding were overruled in Williams vs. Dearborn Truck Company, 218 Ky. 271, 291 S. W. 388, and such failure is no longer to be regarded as a defense." Robb vs. Midland Acceptance Corporation, 8 S. W. (2d) 377. Frank S. Ginocchio, of Lexington, for appellant. Geo. W. Vaughn, of Lexington, for appellee.

Missouri.

On "doing business" by a foreign corporation, alleged to be unlicensed, in connection with suit brought by it. On appeal the St. Louis Court of Appeals says: "It is next said that the demurrer to the evidence should have been sustained, because plaintiff was shown to be a foreign corporation doing business in Missouri without a license. Such defense is an affirmative one, and it would be incumbent on defendant to show that plaintiff was a foreign corporation doing business in this state and that it had no license. We have examined this record very carefully, and it does not show, satisfactorily, at least, that plaintiff is a foreign corporation, and certainly there is no showing that plaintiff was *doing business* in this state, as that term is defined in law. Plaintiff's witness Helman did say that he did not know whether the corporation was licensed in this state or not. He further testified that plaintiff, however, had no goods in this state for sale and had no office; that he went around and took orders for goods; that he then sent the orders to the factory, and that he was paid on a commission basis. This whole record does not disclose that plaintiff was 'doing business' in this state within the meaning of the law. Colt v. Watson (Mo. App.), 247 S. W. 493." American Mfg. Concern v. Manufacturers' Printery, Inc., 6 S. W. (2d) 984. Earl M. Pirkey, of St. Louis, for appellant. Frank C. O'Malley, of St. Louis, for respondent.

New York.

Sufficiency of service of process on exclusive territory sales agent of an unqualified foreign corporation. The Illinois corporation here involved is not qualified to do business in New York, and claims not to be so engaged therein. The court does not consider that question at all. No agent for service of process has been designated. Service was made on a certain individual on the theory, disclaimed by the defendant, that he was the company's "managing agent." He was acting under a written contract as exclusive sales agent for his territory. The contract provided that he was to maintain an office, with the necessary clerical and selling forces, to be known as the company's local sales office;

the company's name was to be listed in the local telephone directory; company letter heads, envelopes, business cards, etc., carrying the local sales agency designation and address were to be furnished to him; in addition to making sales he was to guard the interests of the company, under instructions therefrom (it was asserted that he was clothed with no general powers involving the exercise of independent judgment and discretion), in connection with service, guaranties, contracts, and agreements. His sole compensation (he paid his office expenses and recompensed his salesmen) was commissions on sales made through his agency. He had no power to make contracts for the company, or to receive or disburse money on behalf thereof, or to use the company's name on purchase orders for himself or for contracts to which he was a party. The New York Supreme Court, Chenango County, is satisfied that for the purpose of serving process this agent was a "managing agent" of the defendant, differentiating Lillibridge, Inc., vs. Johnson Bronze Co., 222 N. Y. S. 130, affirmed 247 N. Y. 548, 161 N. E. 177 (digested in the November 1927 Journal, page 39), since the agent there was not under contract and maintained his office of his own volition and for his own benefit. Johnson vs. Pacific Steel Boiler Corporation, et al., 230 N. Y. Sup. 441. Frank W. Barnes, of Norwich, for plaintiff. Hubert L. Brown, of Norwich, for defendants.

What constitutes "doing business"; service of process. The defendant here is a New Jersey corporation with its main office in Rahway. It has a sales office in New York City, with two stenographers, from which three salesmen operate (in New York state, in other states and in Canada); the corporation's name is on the office door; its letter heads show a New York office; it has a New York bank account; orders taken by the salesmen must be confirmed at Rahway before becoming binding; they have no power to make prices or to collect or disburse money: otherwise the business is conducted outside of New York. Service of process was on two New York salesmen on the theory that one of them was the managing agent of the defendant's business conducted in the state. The United States District Court, Western District of New York, grants defendant's motion to set aside the summons, holding that the corporation was not doing business in New York in such a sense and in such a degree as to bring it within the statute. The court intimates that its decision might have been different had the evidence indicated a considerable volume of New York business as a result of the maintenance and operation of the New York City office, and says: "It is not enough to show, as was shown in the instant case, that the company had established an office in New York City, with a force competent to do business within the state. In order to show that it was doing business within the state, it must present evidence that as a result of the functioning of that office the product of the foreign company was regularly coming into the state in some quantity and some degree of regularity." The court cites several United States Supreme Court decisions, and discusses the conclusions reached therein, and after comparing and differentiating, bases thereon its finding, as above stated. Buffalo Batt & Felt Corporation vs. Royal Mfg. Co., 27 F. (2d) 400. Simon

Fleischmann, of Buffalo, N. Y. (Martin Clark, of Buffalo, of counsel), for the motion. Goldring, Sherman, Reisman & Killeen, of Buffalo (Benjamin D. Reisman and Edward Wolkind, both of Buffalo, of counsel, opposed.

Texas.

On "doing business". Corporation may sue on a contract involving interstate commerce only even though it may be doing business in the state contrary to its laws. The plaintiff appellant is a Colorado corporation; it is not licensed to do business in Texas; it has no resident agent in Texas. The corporation, as a division of Alexander Industries, Inc., is engaged in the business of renting motion picture films which films are screened in local picture houses under contracts between the corporation and the theatres that are separate and distinct from those entered into with the advertiser. The films are shipped from Denver and after use for the contract period are returned to Denver by the theatres. Action is by the corporation on default on a rental contract entered into with a Texas partnership. The contract was signed in Texas by the advertisers, and, on behalf of the corporation, by a special salesman working on a commission basis, but, by its terms, was not binding on the corporation until countersigned by an officer of Alexander Industries, Inc., in Denver. The contract was so countersigned. The court below sustained the defense that as the film company was an unlicensed foreign corporation and as the performance of the contract in Texas necessarily required the transaction of business in the state recourse to the state courts on the contract was to be denied. The Court of Civil Appeals of Texas first reversed the judgment and remanded. The court reached the conclusion that the transaction, evidenced by the contract and the facts found was one in interstate commerce, and so, as to that contract, qualification was not necessary to permit the corporation to sue on it, but remanded because it was not fully informed of the nature and effect of the separate contracts with the theatres. "It may be they show that appellant is doing business in this state." On motion by appellant for rehearing, the attention of the court was called to Texas & Pacific Railway Co., 55 S. W. 562, in which at page 564 the Texas Supreme Court said: "We do not doubt that the shipment of the cattle was an interstate shipment and that therefore the contract was a lawful one, although the corporation may have been doing business in the state contrary to its laws." The motion for rehearing was sustained, the case reversed, and judgment rendered for appellant, the court saying: "The last clause in the above quotation seems to settle the only question on which we were in doubt." Alexander Film Co. vs. Lazeres & Morfesy, 7 S. W. (2d) 599. R. A. D. Morton and Jno. M. Worrell, both of El Paso, for appellant. Lea, McGrady, Thomason & Edwards, of El Paso, for appellee.

Taxation

Alabama.

State license tax for privilege of selling cigars, cigarettes, etc., held constitutional. The Alabama state constitution by §221 provides that "The Legislature shall not enact any law which will permit any person, firm, corporation or association to pay a privilege, license, or other tax to the state of Alabama, and relieve him or it from the payment of all other privilege and license taxes in the state." By the General Revenue Act of 1927 a license tax is imposed on sellers of cigars, cigarettes, etc., based on the wholesale selling (or purchase) price of such goods sold, it being provided by the taxing act that "No county shall levy a privilege or license tax on any business or occupation on which a privilege or license tax is levied in this section or any subdivision thereof." It was urged that to the extent of this license tax the law is unconstitutional because of the restriction of the quoted proviso. The Supreme Court of Alabama however holds that the inhibition of the constitution covers municipal (city or town) and county taxes and as counties only are prohibited from levying a tobacco license tax, municipalities being free to impose such a tax, the constitutional provision is not violated. Other grounds of unconstitutionality, such as discrimination (wholesale prices varying, purchasers in large quantities enjoying better terms than those extended to the smaller dealers), were urged, but without success. Exchange Drug Co. vs. State Tax Commission, et al., 117 So. 673. R. B. Evins, of Birmingham, for appellant. Richard T. Rives, Sp. Asst. Atty. Gen. and Hill, Hill, Whiting, Thomas & Rives, of Montgomery, for appellees.

Alberta, Canada.

Direct vs. indirect taxation. Tax on gross revenue from mines held to be indirect and so invalid. The question here is whether or not the Mine Owners Tax Act, 1923 (Alta.) c. 33, of the Province of Alberta, which imposes on mine owners a percentage tax on the gross revenues of their coal mines is ultra vires the Province as an attempt to impose indirect taxation (s. 92 of the B. N. A. Act, 1867). The Judicial Committee of the Privy Council after quoting from Lord Hobhouse's observations in delivering the judgment of the Board in Bk. Toronto vs. Lambe (1887), 12 App. Cas. 575, asks, "What then is the general tendency of the tax now in question?", and in answer says: "Their lordships can have no doubt that the general tendency of a tax upon the sums received from the sale of the commodity which they produce and in which they deal is that they would seek to recover it in the price charged to a purchaser." Therefore the tax is held not to be a direct tax and so is an invalid imposition. The King vs. Caledonian Collieries, Ltd., 3 D. L. R. 657. O. M. Biggar, K. C., and G. Lawrence, K. C., for appellant. Pritt, K. C., and H. S. Patterson, for respondent.

California.

Proposed franchise tax on domestic and foreign corporations based on net income. A proposed amendment to the California constitution giving power to the Legislature to impose a franchise tax on business corporations doing business within the limits of the state on the basis of net income, such tax to be in lieu of the present tax on corporate franchises, will be voted on at the November 6 election. The stated rate is 4%. The tax is to be subject to offset by the amount of personal property taxes paid, up to 90%, of the "income tax." Minimum tax in any event, without offset, $25. The legislature, two-thirds of all the members elected to the two houses voting in favor thereof, may change the rate and the amount and nature of the offset, and may provide by law for the taxation of the corporations or the franchises by any other method authorized by the constitution. It is provided that the legislature shall define "doing business" and "net income"; the latter may be defined to be the entire net income received from all sources. The legislature is to provide for the allocation of income.

Illinois.

City ordinance licensing and regulating the business of manufacturing confectioners held to be valid. It was contended that the city (Chicago) has no inherent power to license occupations; that the city has not been expressly delegated power so to do; that there is nothing in the Charter to warrant. The city does have power "to do all acts, make all regulations, which may be necessary or expedient for the promotion of health or the suppression of disease." Counsel for the city does not contend that the city has authority to license occupations except as an incident to regulation. The Supreme Court of Illinois upholds the Chicago ordinance licensing and regulating the business of manufacturing confectioners saying: "The universal use of confectionery of all sorts by adults and by children renders it pre-eminently a fit subject for surveillance as an article of commerce under pure food laws and its manufacture and preparation for commerce where it is manufactured. We are of the opinion the ordinance in question is a valid police regulation and within the competence of the city to enact." Crackerjack Co. et al. v. City of Chicago, 161 N. E. 479. David R. Clarke and John Harrington, both of Chicago, for appellants. Francis X. Busch, Corp. Counsel, of Chicago (Leon Hornstein and Ruth C. Nelson, both of Chicago, of counsel), for appellee.

Kentucky.

Tax on sales of gasoline is a strict "excise" tax. It was contended by the appellee oil company that having paid its corporation license or franchise tax for the year 1924 under § 4189a et seq. of the Kentucky Statutes it was not required to pay the 3c per gallon tax on gasoline sold during 1924 after the effective date of such law, June 18, 1924, on the theory that being a license tax its imposition in addition to the regular general license or franchise tax would be double taxation

—i. e., the collection of a tax twice for the same purpose in the same year. The state auditor contended that the regular annual corporation license tax though paid in 1924 was for the privilege of transacting business during 1923, and further that as the purchaser of the oil rather than the seller in effect paid the sales tax as the amount thereof is added to the cost of the oil to it the seller is not entitled to recover in any event. The Court of Appeals of Kentucky reversing the court below cites Green, Auditor vs. Frankfort Distillery, 273 S. W. 28 in which it is held that the corporation license tax is prospective rather than retrospective, but states that it need not enquire as to the correctness of that and other conclusions therein reached, and further that it need not discuss or determine the ethics of appellee's position, as the gasoline sales tax is a pure excise and in no sense a privilege or license tax and so that the question of double taxation does not arise and holds that the oil company is not entitled to recover the amount of such tax paid by it into the state treasury during 1924. Shanks, Auditor vs. Kentucky Independent Oil Co., 8 S. W. 383. Frank E. Daughtery, ex Atty. Gen., Chas. F. Creal, ex Asst. Atty. Gen., James W. Cammack, Atty. Gen., and James M. Gilbert, Asst. Atty. Gen., for appellant. H. B. Mackoy, of Cincinnati, Ohio, C. C. Grassham and W. A. Berry, both of Paducah, Robert T. Burke, of Louisville, Browning & Reed, of Ashland, and C. C. Turner, of Frankfort, for appellee.

New York.

Annual franchise tax in default; lien on real property; right of purchaser of the realty subsequently paying the tax, to discharge the lien, to recover therefor from the vendor corporation. Section 197 of the Tax Law provides that if the annual franchise tax due from domestic corporations under § 182 of the Tax Law is not paid when due and payable, such tax is a lien on the real and personal property of the defaulting corporation until paid. Here, the realty company neglected over a period of years to make reports to the tax commission, and paid no franchise taxes the tax comission having stated no account of the taxes due and having served no notice of the audit and statement of a tax. Real estate owned by the company during the period was later conveyed to plaintiff, the company covenanting that the premises were free from incumbrances. The New York Court of Appeals holds that the plaintiff vendee is entitled to recover from the company the amount of the taxes for the defaulted period subsequently stated by the tax commission and paid by the plaintiff, since at the time of the sale the property purchased was incumbered by liens for unpaid taxes. Engelhardt vs. Alvino Realty Co., Inc., 162 N. E. 287. Frederick C. Lawyer, and I. J. Ginsberg, both of Brooklyn, for appellant. Douglass Newman, of New York City, and Clarence Bachrach, of Brooklyn, for respondent.

Porto Rico.

Auditor of Porto Rico has no authority to revise decision of

Board of Equalization and Review. The United States Circuit Court of Appeals, First Circuit, holds (other phases of the action need not be touched on) that in connection with the Porto Rican income tax the auditor of Porto Rico is without power to revise a decision of the Board of Equalization and Review (Fajardo Sugar Company vs. Holcomb, 16 F. (2d) 92), the Act of March 4, 1927, amending section 20 of the Organic Act of Porto Rico, not having enlarged his powers in that respect. Halcomb, Auditor, vs. Fajardo Sugar Co., 27 F. (2d) 13. William Cattron Rigby, of Washington, D. C. (J. A. Lopez Acosta, of San Juan, Porto Rico, on the brief, and James R. Beverley, Asst. Atty. Gen., of counsel), for appellant. David A. Buckley, Jr., of New York, N. Y., for Appellee.

Texas.

On waiving the due process clauses of the Federal constitution. Judgment below (affirmed by the Court of Civil Appeals) was for the state for a tax and 10% penalty. The plaintiff-in-error agreed below that if the state was entitled to recover judgment for the taxes it was likewise entitled to recover 10% of said amount as penalty. The assessment of the penalty is now assigned as error. The Commission of Appeals of Texas, Section B, says: "No court would think of reversing the judgment of the trial court for having rendered a judgment against one who has specifically agreed that such judgment might be rendered." The Commission further says, though asserting that it is not necessary to decide whether or not the principle enunciated is applicable in the instant case, that "The due process clause [of the Federal Constitution], and every other clause looking to the protection of the property rights of the citizens, are not to be ignored or lightly treated, but, being for the benefit of the citizens exclusively, the right under such clauses is one that may be waived, or the circumstances attending the particular transaction may raise an issue of estoppel, or, if not strictly estoppel, a situation akin thereto in the nature of an implied contract upon the part of the person affected." Louisiana Ry. & Nav. Co. vs. State, 7 S. W. (2d) 71. Bruce MacMahon, of Greenville, and Touchstone, Wight, Gormley & Price, of Dallas, for plaintiff in error. J. E. Abernathy, Co. Atty., and W. C. Dowdy, Asst. Co. Atty., both of McKinney, H. Grady Chandler, Asst. Atty. Gen., and W. P. Dumas, of Dallas, for the state.

Delaware Corporations Organized.

386 corporations were organized under the laws of Delaware from September 21 to October 20, as against 442 for the preceding 30-day period, and 425 for the corresponding period of one year ago.

Some Important Matters for November and December

ALASKA—Annual Corporation Tax due on or before January 1. Domestic and Foreign Corporations.

DELAWARE—Annual Report due on or before first Tuesday in January. Domestic Corporations.

DISTRICT OF COLUMBIA—Annual Report due between January 1 and January 20—Domestic Corporations.

INDIANA—Annual Report due during January—Foreign Corporations.

NEW MEXICO—Annual Franchise Tax due on or before November 30—Domestic and Foreign Corporations.

NEW YORK—Annual Franchise Tax on Business Corporations due on or before January 1.—Domestic and Foreign Business Corporations other than realty and holding companies.

Supplementary franchise tax return due on or before November 30—Domestic and Foreign Corporation organized or qualified between June 30 and November 1 of current year.

UNITED STATES—Fourth Installment of Income Tax imposed for the calendar year 1927 due on or before December 15.

UTAH—Corporation License Tax due between November 15 and December 15—Domestic and Foreign Corporations.

The Corporation Trust Company's Supplementary Literature

In connection with the various departments of its business The Corporation Trust Company publishes the following supplementary pamphlets and forms, any of which it is always glad to send without charge to readers of The Journal:

Some Legal Questions in Relation to Investment Trusts. A discussion of their validity, taxability, distinction between "trust" and "association," with citations of leading court decisions and decisions of the U. S. Board of Tax Appeals, and their treatment under the New York State Income, Inheritance and Stock Transfer Taxes.

What Constitutes Doing Business. (Revised to July, 1928). A pamphlet containing brief digests of decisions selected from those in the various states as indicating what is construed in each state as "doing business."

Six Points to Watch in Incorporation. A valuable reminder for attorneys when planning a corporate structure or drafting incorporation papers.

Two Notable Certificates of Incorporation. Certificate of Standard Oil Company of California, and that of Tide Water Associated Oil Company.

Certificate of Incorporation of Pullman Incorporated. Pullman Incorporated was the first internationally known corporation to take advantage of the new features of the Delaware law as amended in 1927, and its charter will therefore be of great interest to lawyers.

Safeguarding Stock Transfers. Dealing with the many pitfalls in transferring stock on a corporation's books.

Delaware Corporations. Presents in convenient form a digest of the Delaware corporation law, its advantages for business corporations, the attractive provisions for non par value stock, and a brief summary of the statutory requirements, procedure and costs of incorporation. Revised to January, 1928.

When Doing Business Is Illegal. A brief discussion, illustrated by many actual examples taken from the court records of various states, of the difference between "Interstate" and "Intrastate" business.

Special Reports. When cases are decided that seem to be of some particular interest or significance in connection with the matter of doing business by foreign corporations, The Corporation Trust Company sometimes issues one of these special reports. Two are now available—one on the Richardson case, and one on the Southwest Company case.

Transfer Requirements Chart. This supplement to The Stock Transfer Guide and Service shows the classifications into which requests for stock transfers are divided and how the principal requirements for each classification may be determined, either by the transfer agent or the individual desiring transfer made.